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No. VI.

CLAIM

OF THE

CATHOLIC MISSION OF ST. JAMES, WASHINGTON TERRITORY.

The claim of the Catholic Mission of St. James to 640 acres of land, under the act of Congress approved August 14, 1848, entitled "An Act to establish the Territorial Government of Oregon."—(9 Stat., 323.)

ON APPEAL FROM THE COMMISSIONER OF THE LAND OFFICE TO THE
SECRETARY OF THE INTERIOR.

REMARKS UPON THE DECISION OF THE COMMISSIONER.

It will doubtless be impossible for the learned and honorable Secretary, to determine this appeal satisfactorily to his own conscience, without a careful review of the evidence and arguments, upon which the case has been decided in its previous stages. It is therefore assumed that he will give his attention to the paper presented on behalf of the Mission, upon the hearing before the Surveyor General of Washington Territory, which is herewith exhibited, marked No. 1; to the testimony therein cited; and to the decision of the Surveyor General, which was reversed by the Commissioner, and which we now ask him to re-establish and confirm as the law of the case. It is annexed, No. 2. Therefore, it is not proposed to repeat these details, or to make a minute examination of the matter in this paper; but, resting upon the positions of fact and law asserted and maintained in those documents, to confine what is now to be said, to a review of the decision of the Commissioner.

This officer finds his conclusions upon three propositions. He says: * * * * "We find as follows:

1st. That the Hudson's Bay Company *held a license*, dated 30th May, 1838, *to trade* 21 years with the Indians west of the Rocky

Mountains, having in fact reduced into possession the body of the land in question as early as the year 1824, and held possession of it from 1824 to 30th May, 1859.

2nd. *These rights were protected*, first, by the provisions of the Joint Convention of 1818 for 10 years; and thereafter, by the Convention of 1827, *treaty, vol. 8, (Stat. at large,) pp. 248, 360*, whereby those provisions were indefinitely extended and continued in force.

3rd. The "*possessory rights* of the Hudson's Bay Company" are specially protected and expressly guarantied by the 3d Article of the Treaty between the United States and Great Britain, concluded 15th June, 1846, vol. 9, (Stat. p. 270.)

From these assumed premises, he proceeds instantly to the following conclusion:

"It follows consequently, that 24 years *prior* to the act approved August 14, 1848, (establishing the Territorial Government of Oregon,) *which contains a proviso confirming title to Mission Stations*; and nearly 11 years after the date of that act, the land in controversy was placed by convention and treaty, between the United States and Great Britain, *in a state of isolation*, and was set apart to, and in *lawful and undisputed possession* of the Hudson's Bay Company. *Will any man say that in this condition of affairs, it was the purpose of Congress by the said act of August 14, 1848, in defiance of the obligations which the United States had assumed, TO TAKE HOLD OF 640 acres, and set apart and confirm such property to the Mission?"*

It is respectfully asked of the Secretary to examine carefully this part of the argument; for the whole fabric of the Commissioner's opinion rests upon it.

And admitting what he thus states and assumes, (for the sake of the argument only,) what does it amount to?

It embraces two things, to-wit:

First. That the act of Congress of August 14, 1848, must be so construed as not to be in violation—or to use the rather excited language of the Commissioner—"in defiance of" the obligations which the United States had assumed by treaty towards the Hudson's Bay Company.

Secondly. That by these treaty obligations, that company had certain rights in the soil thereby recognized, and by virtue of which these particular lands were placed in "*a state of isolation*," (not a very exact legal designation,) and were "set apart to, and in the lawful and undisputed possession of, the Hudson's Bay Company."

As to the *first* proposition, *nobody denies it*, as an abstract truth. It is plainly founded upon natural reason, and natural morality and conscience. It is axiomatic in public law and in municipal jurisprudence.

But when this is admitted, it remains to inquire, what are *these violated obligations*; who is complaining of the "*defiance*" of them;

and in what manner are they "*defied*," or in any degree impaired, ignored or slighted?

If it should turn out in this inquiry, that no such obligations are now, or at any prior time in the history of this claim, have been "*defied*," ignored, or slighted; if, on the other hand, it should plainly appear, beyond all candid criticism, that these obligations, whatever they were, have been religiously observed in form and substance, and that this claim may well be "*confirmed*" without giving ground for the slightest imputation of want of faith towards Britain or British subjects;—if it should be made undeniably evident, not only that *no ground* of complaint in this respect exists, but that no one *claims* any redress, or interposes any objection, founded upon those treaty obligations, what becomes of this *substratum* of the Commissioner's argument, and what, consequently, becomes of the argument and decision founded upon it?

The answer is plain. If we find that the grant claimed by the Mission, under the act of 1848, perfectly well consists with these obligations by treaty, assuming them to be all that the Commissioner asserts, it follows that the propositions of the Commissioner are purely abstract, and have no practical application or value in the case.

And so it is. No candid mind can deny it, having any acquaintance with the subject.

Indeed, the Commissioner himself, in his three fundamental propositions, distinctly admits it. The Conventions with Great Britain, to which he there refers, show it. Finally, in his 3d proposition, he, in so many words, declares the rights of the Hudson's Bay Company, guarantied by these Conventions, to be merely "*possessory rights*." He uses this language; and he could use no other, if he understood the business. The treaty of 1846, (art. 3d) uses this same language. It is carefully guarded in respect of the right to the soil, and the right of sovereignty. It refers to the Hudson's Bay Company, and its occupation of the land, or its claim to lands under whatever pretensions, as "*the possessory rights of the Hudson's Bay Company*;" and it declares simply that these "*possessory rights*" * * "*shall be respected*." That is to say, *possession*, and *right of possession*, as they then existed, were recognized, and the treaty provided that nothing should be done interfering with this *possession*, or, in other words, disturbing the temporary occupancy of such lands as by the treaty, and the license of the company, they were lawfully occupying.

This is language about which no controversy has ever arisen. It has never been pretended that it implied, or was consistent with, the renunciation of the title of the United States to the territory which by that treaty was finally acknowledged to be the property of the United States, and which this government had claimed by a right which being paramount, excluded all possibility of a *grant of the soil* by Great Britain. It was perfectly well known to all per-

sons acquainted at all with the subject, that when the line of 54° 40' was abandoned by the United States, and the parallel of 49° accepted by way of compromise, as the boundary, all the land lying south of that parallel was conceded to be the property of the United States in absolute right and sovereignty, subject only to the incumbrances in favor of "the Hudson's Bay Company," then existing, and recognized as merely "*possessory rights*." The language of the article (III, 9 Stat., 870) is remarkable. It contemplates the disposition of the lands by the United States, by donation, sale, or otherwise, and simply stipulates that in such disposition, these "*possessory rights*" shall be respected. The article is brief, and may be quoted fully and literally with advantage at this point of the argument.

"ARTICLE III.

"In the future appropriation of the territory south of the forty-ninth parallel of north latitude, as provided in the first article of this treaty, the *possessory rights* of the Hudson's Bay Company, and of all British subjects, who may be already in the occupation of the land, or other property lawfully acquired within the said territory, shall be respected."

When, therefore, the United States, in the year 1846, settling the Oregon controversy, obtained undisputed title to the lands south of the 49th parallel, and "*the appropriation*" of these lands was conceded to belong to the United States, one thing *only* was reserved, not as preventing such "*appropriation*," but as qualifying it; that is to say: albeit the United States assert, and Great Britain admits, the right of the former to "*appropriate*" the lands, this "*appropriation*" shall be exercised in such manner as to "*respect*" the "*possessory rights*."

Is it not plain, that the United States by this article openly asserted, and Great Britain distinctly admitted, the right to dispose of these lands, with this single qualification?

If this be not plain, can it be denied that the qualification, or reservation, or by whatever name it may be called, was a stipulation in favor of the Hudson's Bay Company, and other British subjects?

Was not this the only thing interposed to incumber the absolute disposition of the lands by the United States?

And can anything be clearer, as a principle of universal jurisprudence, than that such a stipulation can only be availed of by, or in the name and right of, those in whose favor it is made?

Above all, was it ever heard before that the party upon whom such a stipulation is imposed, or those claiming under him, can allege it to defeat his own grant, encumbered only by such a stipulation in favor of others, who have no pretence of any interest in its application?

These things seem too simple and elementary to require, or admit of, any argumentation, and yet the Commissioner ignores or disregards them.

His argument is briefly thus: The United States stipulated with Great Britain that *in granting* the lands in this territory, *it would so grant them as to respect the "possessory rights" of the Hudson's Bay Company*; that company had "possessory rights" in these lands; *therefore*, the United States stipulated *not to grant them at all*.

And again: The United States stipulated to respect the possessory rights of the Hudson's Bay Company in "*the appropriation*" of these lands. The United States *did* appropriate the lands, in such manner that no right of the company was disturbed or denied, but so that such rights were respected, and the grantees of the land could only take subject thereto; *therefore*, such grantees *took nothing*.

And again: If the United States had so granted the lands as not to "respect the possessory rights of the company," such grant might have been avoided by the company or those claiming under it, as contrary to the express stipulation of the treaty. The United States *did* grant the lands *without any express reference to those rights*, and consequently *without respecting them*; *therefore*, the grant is void, *ab initio*, whether it *conflict with those rights or not*; and its nullity may be *alleged by the United States themselves, or by their subsequent grantee*, although the prior grant was in entire subservience to those rights, and no disturbance of them is pretended.

This sort of reasoning can surely not have received the deliberate assent of the Commissioner; and yet this is the basis of his argument. He very properly addresses himself mainly to the construction of the act of August 14, 1848, upon which the Mission claim is exclusively founded. He assumes that it must necessarily be construed to violate—to be "in defiance of"—the treaty stipulations with great Britain, if it affects any lands in Oregon which were encumbered with the "possessory rights" of the Hudson's Bay Company; and having assumed this, (without reason,) he argues that Congress could not have intended such violation, and concludes that the grant was not made.

But he evidently feels the necessity of fortifying this fundamental position by something more than can be found in the treaty and the act of Congress; and very curiously does he attempt such reinforcement. He boldly imputes to Congress and the President, in the passage of the act of 1848, a most stupid and unpardonable ignorance of the condition of the Territory about which they were legislating. In the sentence immediately following that last quoted, he says: "Let it be borne in mind, too, that when the Mission confirmation act of 1848 was passed, the Hudson's Bay possessions were known to Congress only by the Conventions of 1818 and 1827, as interests protected and guarantied 'indefinitely;' and the

“fact of the expiration of these rights was not brought to the knowledge of the Department until 1859.”

That is to say: In 1846, when the all-absorbing claim of 54° 40', and “*the whole of Oregon or nothing*” was happily terminated, and the “possessory rights” of the Hudson’s Bay Company were the subject of diplomatic negotiation, and were finally recognized by our Government, we were in ignorance of what we were recognizing; although the rights of that company were as patent to the world as those of any corporation created by the Crown and Parliament of Great Britain.

This is monstrous. It is an open official imputation of gross ignorance, in a plain and obvious matter of easy understanding and imperative duty, upon the legislative and executive branches of the Government of the United States.

It cannot be decently said that we were ignorant in that treaty of 1846, of the nature and extent of the “possessory rights” of the Hudson’s Bay Company. The Hon. Secretary of the Interior will at once reject so disreputable an imputation. He knows it is unfounded.

But he is to act in the matter judicially. And even if it had been made to appear (as it cannot be) by the debates in Congress upon the passage of this act of 1848, that there was such ignorance in the minds of senators and members of the House, and that the act was passed in total misunderstanding of the rights therefore guaranteed by treaty, the learned Secretary well knows that after all, the act is to be construed by its own terms, without any reference to such opinions or misapprehensions in the minds of those who voted for it. Such a rule of interpretation would lead to endless confusion and uncertainty. It is only necessary to remind him of a single case in the Supreme Court of the United States, if upon this question he should desire authority. In *Aldridge vs. Williams*, (3 How., 24,) the court (*per* Taney, C. J.) says: “In expounding the law, the judgment of the court cannot in any degree be influenced by the construction placed upon it by individual members of Congress in the debate which took place on its passage, nor by the motives or reasons assigned by them for supporting or opposing amendments that were offered. *The law as it passed is the will of the majority of both houses, and the only mode in which that will is spoken, is in the act itself; and we must gather their intention from the language there used, comparing it when any ambiguity exists with the laws upon the same subject, and looking, if necessary, to the public history of the times in which it was passed.*”

This doctrine, unanimously laid down by the Supreme Court in 1845, and so clearly and precisely expressed by the Chief Justice, must command the common assent of the learned and the unlearned mind. It rests upon common reason, and is fortified by all that technical learning and professional experience can bring to bear upon it. But the Commissioner is disposed of *a fortiori*. He has

no ground for imputing such opinions and intentions to Congress, or to any member of Congress. He asks that gross negligence, and culpable and incredible ignorance, may be gratuitously imputed to Congress and the Executive. This is wholly inadmissible under any manner of construction. It is unfounded equally in fact and reason.

But, *secondly*. What were the "possessary rights?" Were they, as the Commissioner assumes, and as, for the sake of the argument, we have heretofore admitted, in effect a title in the soil, whereby these lands were placed "in a state of isolation," and "set apart to, and in the lawful and undisputed possession of the Hudson's Bay Company?"

Not at all. This is a mere loose assumption, not warranted by anything in the case, and never pretended by the Government of Great Britain.

When the Commissioner, in *his first proposition*, states that the Company "*held a license dated 30th May, 1838, to trade 21 years with the Indians,*" he states the whole title of the Company. They never had any right in or title to the soil, beyond the mere *incidents* to this license. They had the right to *occupy* so much land as was necessary to carry on their trade, for the time thus specified, viz: 21 years from 30th May, 1838, expiring 30th May, 1859. The British Government never claimed, or admitted, any other or different right in the premises. This abundantly appears by the official publication of "*Papers relative to the affairs of British Columbia, 1859,*" pp. 42, 43, 47, &c. Sir E. B. Lytton, on the 16th July, 1858, says to Governor Douglas, in an official despatch: "*The company is entitled, under its existing license, to the exclusive trade with the Indians, and possesses no other right or privilege whatever.*" And on the 14th of August following, he repeats the denial of any other right or privilege. [See this official paper, a copy of which is in the State Department, and extracts from which are appended hereto.]

When, therefore, the Commissioner asserts that the Company had "*reduced into possession* the body of the land in question," he speaks in the face of the official declaration of the British Government to the contrary.

When he asserts that the conventions of 1818 and 1827 recognized "*these rights,*" (meaning rights in the land,) he speaks apparently without having those conventions before him; for they carefully avoid the recognition of any such right. They simply provide for the joint occupation of the Territory, until such time as the conflicting pretensions of the two nations should be settled, as they finally were settled by the treaty of 1846, so that nothing can be clearer than that the company had *no* title in the land as such, but merely a *trading license* expiring in May, 1859, and the temporary and incidental right to dwell upon and *occupy* for this purpose, and during

this time, *not any particular tract of land marked out and granted*, but whatever vacant land in the Territory might be necessary or convenient. This was the *possessory right* protected by the treaty of 1846; and this treaty it is which mentions their rights for the first and only time.

The Commissioner therefore is altogether wrong when he assumes the "isolation" and "setting apart" of these lands. But if he were right in this, it would not affect the question at issue.

Passing now to the construction of the act of 1848, let us remember that if this act confers *no* title, then the Mission has no title. But, on the other hand, if it *does* confer title whether for more or less land,—whether in fee and unincumbered, or for any qualified estate, incumbered or unincumbered, *then such title*, whatever it was, *vested on the 14th August, 1848*.

We are dealing with a title *vested* on the 14th August, 1848, or with *no title*. The question then is reduced within very narrow limits. If the title was then *vested*, it is sacred and absolute.

The opposing claims are only important to be considered if they are *prior in time*; always supposing that *the title put forth by us was perfect at the date of the act*; and it was either this or nothing.

Now, it is not pretended that either of the opposing claims was prior to ours:

1. The "mysterious" claim under the name of "*the Military Authorities*," dates from May, 1849—nine months after our supposed title vested. In that month, without any authority of law *ad hoc*, an officer of the army (Maj. Hathaway) *leased* certain of these lands from the Hudson's Bay Company for a garrison, quarters, &c.; that is to say: the United States having stipulated in 1846, that "*in the appropriation*" of the lands, the "*possessory rights*" of the Hudson's Bay Company should "*be respected*," the United States (supposing this officer to have authority) did, *in* 1849, exercise this admitted right of appropriation; only taking care to "respect the *possessory* rights of the Hudson's Bay Company, by taking this consent, called a *lease*." It would be curious, and perhaps instructive as to this case, to see the terms of this instrument. Certainly, if it in any manner or by any implication renounced or put in doubt the absolute proprietary right and sovereignty of the United States, it was in the face of the treaty, and would be repudiated and denounced as wholly without authority, and against the "supreme law of the land."

But with what intent was such a lease taken? Can it be denied that it was with the intent to "*appropriate*" the land, "*respecting*" the possessory rights of the Company?

This first act, wholly without authority of law, was subsequent to our perfect title, if we have any title at all.

The next step was the order of Gen. P. F. Smith, declaring a reservation of four miles square. This was in May, 1850. Again it must be repeated that if we have any title it was already vested.

Next came the general act of Feb. 14, 1853, limiting the quantity of land reserved for forts, &c., to 640 acres. This is the legislative recognition relied on. But, again we say, our title, if any, was already vested.

Then came the board of officers to value improvements in 1854. The same answer applies; if possible, it gains by each repetition *a fortiori*.

But meantime, it is said the Government had expended over a million of dollars in permanent improvements on these lands; and this is one of the obstacles presented to us.

Let us look at this a moment. The fundamental objection to our claim is, that the United States could not in good faith dispose of these lands pending the "indefinite" rights of the Hudson's Bay Company. We have seen that as to time they were not indefinite, but had a fixed termination in May, 1859. But either way, how can the United States at the same time deny their right to appropriate or dispose of the lands permanently, (only respecting the possessory rights of the company,) and yet in 1849, 1850, 1853, or 1854, have *made* such appropriation and permanent disposition, and *now set it up against its grant to us in 1848*? always assuming that we establish that *grant*, which is our whole case.

2d and 3d. The town-site and the Widow Short—these are both subsequent to us. The Government of the United States does not admit either of them. It cannot do so with any respect to the plain law and fact of the case. It is enough in this connexion, to say that these claims are wholly independent of ours. If we are right in claiming under the act of 1848, whether more or less land, then these claims cannot interfere with us. If we have no claim, then these claims are to us matters of perfect indifference.

The whole matter then comes back to the act of 1848, and the facts which we have put in evidence under that act.

That the Government of the United States had spent millions on this land, and that the public interest requires its absolute and undivided possession, would be nothing to the purpose of this question of legal, Constitutional, vested right. The Constitution provides for all such cases. No private interests can stand in the way of the public necessity or convenience. All private property is subject to be taken for public use; the only condition is, that it shall not be taken without just compensation. This fundamental law has been applied to a case arising under the same act, of 1848, as to lands claimed by "the Missionary Society of the Methodist Episcopal Church" in Oregon. By the act of June 16, 1860, (12 Stat., 28, pamphlet publication, 1859-60.) The claim of that society to lands within the military reservation at Dalles, was purchased at \$20,000. The public has a plain and paramount remedy in the present case. It has no interest which is not fully protected. It is only the secret and personal interests which wear the shadowy name

of "*the military authorities*," that find it absolutely necessary to defeat this claim.

Laying aside, then, all these collateral matters, let us address ourselves to the construction and operation of the act of Aug. 14, 1848, (9 Stat., 323.)

It is entitled "An Act to establish the Territorial Government of Oregon."

In its first section, that which creates the territorial government, are found three *provisos*, interposed in the form of conditions, to the organic law: first, for the protection of Indian rights, and the assertion of the ordinary authority of the United States in that respect: *secondly*, the endowment of Missions among the Indians: and *thirdly*, the reservation of the power to divide the territory into two or more territories, or to attach any portion of it to any other State or Territory of the United States.

The *first* and *second* provisos are naturally connected. They are in pursuance of the same policy, and directed to the same general end, the protection of Indian rights, and the amelioration of the condition of the Indians. And having, by the *first* proviso, declared such protection and paternal supervision, the granting of a bounty in lands to the Missionary Societies who had then existing Missionary Stations among the Indians in this territory, naturally followed.

It is with this *second* proviso that we have to do. It is as follows:

"*And provided, also*: That the title to the land, not exceeding six hundred and forty acres, now occupied as Missionary Stations among the Indian tribes in said territory, together with the improvements thereon, be confirmed and established in the several religious societies to which said Missionary Stations respectively belong."

This is the ordinary and appropriate language of a legislative grant of lands. The "title to the land" is "confirmed and established." In the most solemn form, and in the very act of creating a government for the territory, as a fundamental disposition, the United States grant, confirm, and establish *the title* to the land in the societies which, *at that date*, answer the description in the statute.

What title is granted, confirmed, and established? Manifestly *all the title of the grantor*. The words are wholly inoperative and nugatory, unless *some title* is "confirmed and established." It is an elementary rule that such a construction is not to be adopted, if it be possible to avoid it. We are to consider that these words, introduced in so remarkable a place, mean something. We are to interpret them *ut res magis valeat quam pereat*. Neither the executive or judiciary will so read them as to impute idleness and folly to the legislative. Nobody has ventured to suggest such an interpretation.

Then, what title had the United States in the lands in this territory, at the date of the act?

The answer is, that the United States was sovereign and proprietor, subject only to the stipulations of the treaty of 1846, by which the *vexata questio* of Oregon was settled. As to all *north* of the 49th parallel, Great Britain's title was conceded. As to all *south* of that line (as modified by the treaty) the title of the United States was admitted. But this admission of title was qualified by an agreement that the United States, "*in the future appropriation of lands,*" (that is, in the exercise of the admitted proprietary and sovereign right of disposition) should "*respect*" the "*possessory rights,*" (that is, the right of *possession merely*) of the Hudson's Bay Company, whatever those rights might be. This is the whole matter.

If this stipulation that these "*possessory rights*" should "*be respected,*" had been wholly omitted, can it be doubted that these lands, by force of that treaty, would have been immediately and without encumbrance or condition, grantable by the United States, in absolute fee, as part of the public domain?

Can it be doubted that in such case, the words of this proviso to the organic act of the Territory would have sufficed for this purpose?

Then, this stipulation having been inserted, how is this right of disposition affected thereby? Plainly it is affected only to the extent of inhibiting any infringement of the "*possessory rights*" protected by the stipulation. Nothing can be clearer than that the admitted right of disposition—"the future appropriation of the lands" by the United States—was to be enjoyed and exercised by the United States, with this condition only, to wit: that such disposition or appropriation, gift, sale, or dedication to public use, should "*respect,*" should not disturb,—should be subservient to—these rights of possession, which, wheresoever there was a building, improvement, or enclosure, so far and no further, temporarily encumbered the land.

There was then a thing susceptible of grant; and a grantor authorized to grant; and there was an apt and sufficient designation of the grantee. Whether our Mission answers this description, is a question of fact, not pertinent to this branch of the argument. It is assumed here.

But the Commissioner denies that these lands were the subject of grant.

We have seen that the alleged grant is by the sovereign and proprietor, in the highest form of grant. We have seen that the words of the grant are large enough to effect it, if the thing could be granted at all. We have seen that there are no words of exception, no designation of particular lands as falling under the operation of the grant, and no description of lands withdrawn from it. It applies to all public lands in the Territory of Oregon, to all *title* which the United States had and could grant in those lands, so far as the statute purported to act upon them.

But it is said that although the United States *had title* to the lands, yet it could not dispose of them absolutely *in presenti*, so that the grantee could demand immediate possession.

Granted:—so far as the Hudson's Bay Company was upon these lands with its "possessory rights," these rights must be "respected."

But how does this admission derogate from the right to grant such title as the United States then had; which was the *proprietary* right, encumbered only by a temporary right of possession, for a limited and special purpose?

All the analogies of jurisprudence—whether at the common law, which lies at the foundation of jurisprudence, in the chief dominions of both the high contracting parties, or by the civil Roman law—or the more liberal principles of the public law, founded in natural reason and justice,—all the analogies concur in admitting the right to grant such a title. A man may grant his house and lot, though it be under a lease for "ninety-nine years, renewable forever," for example.

Great Britain, claiming, as we claimed, absolute proprietary and sovereign right in Oregon, nevertheless could by the treaty of 1846, grant and cede these lands to the United States, though expressly reserving the "possessory rights" in question. The treaty proceeded on the basis of compromise, each party withholding any denial of the rights adversely claimed by the other. If the United States derived title, whether in the way of quit-claim or otherwise, from Great Britain, under such circumstances, why might not the United States grant in the same way, reserving the same possessory rights? And whether an express reservation were made or not, the result is the same. The reservation is necessarily implied. The grant must take effect subject to these pre-existing rights, whatever they were.

Such grants are not only of common practice and acknowledged efficacy, in all systems of jurisprudence, as between private parties, but they have been repeatedly affirmed to be valid and effectual in the legislation of the United States.

Upon this point, the opinion of the Commissioner itself furnishes ample authority.

He refers not only to the opinion of the Attorney General Black, of June 3d, 1859, (Lester's Land Laws, &c., p. 505.) quoted in the argument for the Mission, but to a much more elaborate discussion and opinion in the same matter by Mr. Attorney General Cushing, in the case of the "Portage City Claim," (Opinions Attorney General, vol. 8, 255.) in which the whole subject is reviewed, and it is plainly demonstrated, on reason and authority, that the superincumbency of these possessory rights interposed no obstacle to the grant. And in both opinions this conclusion, together with the denial of any right on the part of the United States, or any party claiming under the United States, to allege this outstanding

possession in the Hudson's Bay Company, or any similar supposed defect of title, is clear and unanswerable. Attention is respectfully invited to both these opinions, as fully recognizing and finally settling the question.

But the Commissioner supposes a distinction to arise. Not venturing to controvert this reasoning, which is directed to the *legal* question of the effect of existing "possessory rights," or rightful occupation upon a grant of the lands so possessed and occupied, he suggests that these decisions of the Executive, and the judicial decisions of the Supreme Court, which they quote and on which they are founded, are not applicable, because, he says, that—

"The relations existing between civilized powers and the Indians, and those subsisting between the United States and Europe in Governments as equals under the public law, stand on a very different footing."

This is his answer to the doctrine of the Supreme Court and of the Executive. He admits it, but denies its application, because in the one case the "possessory rights" are admitted as to *Indians*; and in the other, they are admitted as to British subjects.

Now, in natural reason, and in common conscience, this change of *parties* cannot work any change of *principles*, without some reason fairly affecting the principle, which it is difficult to imagine.

But what is the *principle*?

It is simply that the "*possessory rights*"—the "*right of occupancy*," must "*be respected*;" and that in any "*appropriation*," or disposition of the "*title to the land*," the grant takes effect *subject* to these "*possessory rights*."

Can any reason, or fair pretext of argument, be adduced to show that while this principle is admitted as to Indian tribes, it is inapplicable to "*European Governments or equals under the public law*?"

In what is the supposed distinction founded?

The Commissioner does not enlighten us. As a question of "*public law*" it must necessarily be founded in *reason*, or not founded at all. But he vouchsafes no reason whatever, except such as may be found in the fact that the outstanding encumbrance of "*possessory rights*," or "*occupancy*" in the one case resides in Indian tribes, and in the other is vested in grantees of a "*European Government*." In logic, in conscience, in the common apprehension of mankind, this change of the *depository* of the right can make no difference in the *right itself*. Whether in what concerns its own integrity, or in its effects upon the co-existent rights of others, it continues the same, nor more nor less.

Indeed, the argument would seem to proceed *a fortiori* from the case of the Indian "*possessory rights*," to the case of the "*possessory rights of the Hudson's Bay Company*."

In the latter case those rights were the subject of treaty stipulations, and were limited and defined, in point of duration by the

license of the British Crown. No further act on the part of the United States was necessary to extinguish them when that time arrived. But in the case of the Indian occupancy, all was indefinite. This admitted encumbrance could only be extinguished by a *treaty to be made* between the United States and the Indians. This treaty, *ex vi termini*, depended upon the consent and concurrence of the Indians; and if the United States and the Indians should never concur in making a treaty to extinguish the Indian right, then the lands would forever remain subject to that encumbrance.

On the other hand, the "possessory rights" of the Hudson's Bay Company had a fixed termination in May, 1859. No act of either Government was necessary to extinguish them at that time. They passed away with the lapse of a fixed term of years.

How then, with any show of reason, can it be argued that while, as is admitted, the land subject to the Indian encumbrance might be granted, (as in the Wisconsin case;) yet, the land subject to the British encumbrance (which was really no estate in the land, but a mere trading license,) could not be granted in this case?

There is no plausible pretext, certainly no argument founded in principle, to support so absurd a distinction. Then, we conclude the lands might well be granted, subject to the possessory rights of the company, and this statute can only be interpreted as making such grant.

Two things remain to be examined.

First, the certainty of the lands granted:—and secondly, the certainty of the grantee. These determined, nothing is wanted to constitute a perfect grant.

First, as to the certainty of the lands granted:

The donation is of a quantity of land "not exceeding six hundred and forty acres." This is the limit of the grant; and it is now too well settled to admit of controversy, that it extends to that maximum quantity to be laid off in quadrangular form, having the settlement, or spot actually occupied by the donee, as nearly as may be in the centre. No question is made upon this point by the Commissioner. It is a *concessum* on all hands. [Opinion of Mr. Attorney General Wirt, May 11, 1820; Instructions of Land office, Aug. 13, 1823; instructions of same, Aug. 18, 1853; in which last, the Commissioner says, speaking of this *proviso* in the act of 1848: "Such provisions is understood to grant 640 acres to each separate and distinct Missionary Station referred to."]

Then the remaining question is as to the certainty of the grantee.

The Commissioner denies that there was in fact a Missionary Station among the Indians at or near Vancouver, when this act of Congress was passed.

If there was such station, then the claim is fully made out.

Upon this mere matter of fact, the testimony is conclusive.

The origin and history of the Mission are fully exhibited in the evidence. The instructions of the Bishop of Quebec, in the year

1838, to the Reverend pioneers of this Mission, preceded by the letters of June 6, 1835, and June 8, 1835, place this beyond reasonable doubt.

But it appears from the evidence that these priests, and their successors, were aided and protected in some degree by the Hudson's Bay Company, and performed religious services for the servants of that company, who, from a rule of policy adopted and enforced by it, were allowed to marry none but Indian wives.

It is surprising that this fact should have made the slightest impression on the mind of the Commissioner, as tending to show that this was not a Missionary Station. In what does the supposed incompatibility consist? Was it inconsistent with its character as a Mission, that it located itself where it could be protected and aided by the company, while it could at the same time extend its sphere of usefulness so as to embrace in it whites and half-breeds with the Indians? Can it be seriously contended that the fact that the company, sensible of the benefits derived by all who were within the range of the pious labors of those devoted men, felt constrained to *contribute something* towards their support, deprived them in any degree of the character of Missionaries? If any private proprietor had voluntarily set apart an annual contribution equal in amount to the stipend allowed by the company, or had otherwise endowed the Mission with lands or houses, how would this have made it any less *a Mission*.

Upon this question of fact the proofs and arguments submitted to the Surveyor General are so clear and convincing, that it is not thought necessary to dwell further upon it. No candid mind can deny, upon a review of the evidence, that this was a Mission among the Indians in Oregon. In this respect nothing need be added to the argument before the Surveyor General, (see No. IV,) which is a full and minute examination of the testimony.

On the whole, without further extending this paper, it is confidently submitted, that by force of the act of August 14, 1848, a right to 640 acres of land, to be laid off in conformity with the established system of surveys of public lands, having the Mission Church of St. James, as nearly as may be, for its centre, vested on that day, and that whatever has occurred since then is wholly ineffectual as to that right.

Respectfully submitted by

J. M. CARLISLE,
of Counsel, &c.

WASHINGTON, Feb. 2, 1863.

APPENDIX.

PAPERS RELATIVE TO THE AFFAIRS OF BRITISH COLUMBIA, 1858. PAGE 42.

An official dispatch from the Right Hon. E. B. Lytton, Bart., to Governor Douglas, (of British Columbia,) under date of 16th of July, reads thus :

* * * * *

But I must distinctly warn you against using the powers hereby entrusted to you in maintenance of the interest of the Hudson's Bay Company in the territory. The company is entitled, under the existing license, to the exclusive trade with the Indians, and possesses no other right, or privilege whatever.

Another dispatch from the same to the same, under date of 14th of August, 1858, reads again :

Page 47.—Further, with regard to those supposed rights of the Hudson's Bay Company, I must refer, even in stronger terms, to the cautions already conveyed to you by my former dispatches. The Hudson's Bay Company have hitherto had an exclusive right to trade with Indians in the Fraser's river territory, but they have had no right of government or of occupation of the soil. They have had no right to prevent or interfere with any kind of trading, except with Indians alone.

ERRATA.

In paper No. III, in Forbes Barclay's testimony, interrogatory 2, instead of March, 1845, should read 1840.

In paper No. IV, page 29, for autumn of *same* year, should read *some* year.

“ “ “ where the word Appendix occurs, read Evidence.

In paper No. VI, in Mr. Carlisle's argument page 13, where it reads, it is inapplicable to “European Governments *or* equals under the public law,” should read European Governments *as* equals, &c.